Supreme Court, U.S.
FILED
JUL 3 2002
OFFICE OF THE CLERK

No. 02 67

In The

Supreme Court of the United States

GUADALUPE JAIME FAVELA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

EZEKIEL E. CORTEZ
1010 Second Avenue
Suite 1850
San Diego, California 92101
Telephone: (619) 237-0309

Attorney of Record for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

46P9

QUESTION PRESENTED FOR REVIEW

Whether the Ninth Circuit's approval of the Government's use at trial "for impeachment" purposes of Petitioner's involuntary statements violated due process and boldly ignored the explicit holdings by this Court in *Mincey v. Arizona*, 437 U.S. 385 (1978) and *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991)?

TABLE OF CONTENTS

Page

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE 2

STATEMENT OF THE CASE 2

REASON FOR ALLOWANCE OF THE WRIT 6

The Ninth Circuit's approval of the Government's use at trial "for impeachment" purposes of Petitioner's involuntary statements violated due process and boldly ignored the explicit holdings by this Court in *Mincey v. Arizona*, 437 U.S. 385 (1978) and *Arizona v. Fulminante*, 499 U.S. 279 (1991) 6

CONCLUSION 9

APPENDIX A, Memorandum Opinion of Ninth Circuit Court issued on January 25, 2002 ..... App. 1

APPENDIX B, District Court's Order Denying Petitioner's *habeas corpus* petition, filed on January 20, 2000 ..... App. 5

APPENDIX C, Appellate Court's Order Denying Petition For Rehearing and Suggestion For Rehearing *En Banc*, issued April 10, 2002 ..... App. 33

TABLE OF AUTHORITIES

Page

CASES

Arizona v. Fulminante, 499 U.S. 279 (1991) 2, 6, 7, 8

Chapman v. California, 386 U.S. 18 (1967) 7

Dickerson v. United States, 530 U.S. 428 (2000) 8

Harris v. New York, 401 U.S. 222 (1971) 2

Jackson v. Denno, 378 U.S. 368 (1964) 7

Mincey v. Arizona, 437 U.S. 385 (1978) 2, 6, 7

United States v. Garibay, 143 F.3d 534 (9th Cir. 1998) 8

STATUTES

18 U.S.C. § 3501 .....2, 3, 5

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

28 U.S.C. § 2253(a) 1

28 U.S.C. § 2255 1

UNITED STATES CONSTITUTION

Fifth Amendment 2

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Guadalupe Jaime Favela, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on April 10, 2002.

OPINIONS BELOW

The Memorandum Opinion of the Ninth Circuit Court of Appeals affirming Petitioner's conviction was filed on January 25, 2002 and was unpublished; a copy of this Opinion is included in Appendix A. On April 10, 2002 the Ninth Circuit issued an Order denying Petitioner's request for Rehearing and his petition for rehearing *en banc*. This Order is included as Appendix C. The district court's Order denying petitioner's *habeas corpus* petition, filed on January 20, 2000, is included here as Appendix B.

JURISDICTION

On January 25, 2002 the Ninth Circuit Court of Appeals affirmed the district court's denial of Petitioner's *habeas corpus* petition pursuant to Title 28 U.S.C. § 2255. The appellate court had jurisdiction pursuant to Title 28 U.S.C. §§ 1291 and 2253(a). See, Appendix A. Then, on April 10, 2002 the Court of Appeals denied a Petition for Rehearing and rejected a Suggestion for Rehearing En Banc. See, Appendix C. Jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

United States Constitution, Amendment V:

"No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law . . . . "

STATEMENT OF THE CASE

The record in this case unquestionably shows that Mr. Favela, a defendant without any prior convictions **now serving a life sentence**, was subjected to custodial interrogation and induced to give a "confession" only through the promise that his un-*Mirandized* statements were "off the record" and would NOT be used against him. This "confession", which was the undisputed product of improper promises and never documented in any report, was disclosed and offered for the first time at trial to impeach Favela's testimony. The district court admitted these involuntary statements without any hearing at all in clear violation of 18 U.S.C. § 3501 and well-established practice. Trial counsel never raised the voluntariness issue.

What is at issue in this Petition is not a *Harris v. New York*, 401 U.S. 222 (1971) mere technical *Miranda* violation, as incredibly and erroneously held by the Ninth Circuit, but the obvious admission of **involuntary statements** for impeachment purposes in clear violation of 18 U.S.C. § 3501, *Arizona v. Fulminante*, 499 U.S. 279, 288 (1991) and *Mincey v. Arizona*, 437 U.S. 385, 401-02 (1978). The alleged confession, not documented in any report, was

not disclosed to Favela's counsel before trial. So, predictably in the midst of trial and in front of the jury, Favela's alleged statements to the case agent saw the light for the first time.

On re-direct examination by his jury trial counsel, Favela testified that the case agent interviewed him in jail for about 10-15 minutes. And, that the agent asked Favela to cooperate and promised a possible release if he cooperated. But, Favela told the agent that he could not give him information because he didn't know anything. Favela testified that, at that point, the agent threatened him and told him that he would be convicted in court. [R.T. 1015-1047]

Government counsel then informed the trail court that she intended to recall the case agent to impeach Favela with a conversation wherein Favela allegedly confessed to manufacturing methamphetamine at a lab different from those involved in the charges in this case. [R.T. 1118] Unfortunately, Mr. Favela's trial counsel failed to raise any Title 18 U.S.C. § 3501 voluntariness issue; the trial court and prosecutor also missed the mandatory requirements imposed **upon the court** by § 3501.[1]

The case agent testified for the jury that he told Favela that he was there to interview him about the manufacturing of methamphetamine (one of the charges at issue) at a suspect ranch in Dunlap, California and in other counties that they felt he was involved with. Favela

---

[1] § 3501(a) states, in relevant part, "Before [a] confession is received in evidence, the trial judge **shall**, out of the presence of the jury, determine any issue as to voluntariness." (emphasis added)

allegedly admitted knowledge of the lab in Dunlap and that it belonged to one of his co-defendants. At this point, the case agent allegedly stopped to give Favela his *Miranda* rights but Favela wanted instead to talk "off the record" and made the agent assure him that he would not record the interview.

The agent surprisingly testified that he agreed to Favela's unusual request and assured him that the statements would not be used against him. With that assurance, Favela then allegedly admitted that the Dunlap lab belonged to one Martinez and that he ran the lab under Martinez' direction and payment at $20,000.00 per "cook." The agent added that Favela admitted that he was only responsible for the Snelling lab and only ran the Dunlap lab and even added "I'm getting away with the one in Snelling."

On cross-examination, Mr. Favela's lawyer, *inter alia*, elicited from the case agent that he had not tape-recorded the alleged admissions, nor written a report about them, because he had given "Mr. Favela **my word that this was off the record** and its something that is not documented in any way, because if it is, it's then used against him." [R.T. 1120-112, (emphasis added)] At this point, the trial court itself interrupted and conducted the following examination:

> THE COURT: Well, it's being used against him now.
>
> . . .
>
> THE WITNESS: Yes, sir.
>
> THE COURT: **And you promised him it wouldn't be used against him.**

> THE WITNESS: **I told him I would not use it against him**..
>
> THE COURT: But you made it available to people who could.
>
> THE WITNESS: I told [the prosecutor].
>
> THE COURT: You made it available to people who could use it.
>
> THE WITNESS: Yes.
>
> THE COURT: Thank you.

[R.T. 1120-1121, (emphasis added)]

At a later point, Counsel for Mr. Favela moved "to dismiss the testimony of [the case agent] for prosecutorial misconduct." [R.T. 1126-1127]. The Court denied the motion to "dismiss the testimony of [the case agent]", noting, *inter alia*, "I'm terribly disturbed about the situation that the witness testified to, that this was not to be used against Mr. Favela. He went into this interview believing that, and, yet, it's being used against him." [R.T. 1127-1128] (emphasis added). Lamentably, the trial court allowed the government to use the statements for impeachment and Favela was later convicted and sentenced to life imprisonment. Trial counsel never raised the obvious voluntariness issue nor did the trial court even appear to have recalled the mandatory requirements of 18 U.S.C. § 3501.

On appeal, Circuit Judges Goodwin and Trott and District Judge Ezra wrote, in relevant part, in their unpublished Memorandum:

> By promising Favela that his statements would not be used against him, Agent Rodriguez interrogated Favela in violation of his *Miranda* rights. [citation omitted] However, Favela's self-incriminating statements became admissible to impeach him when he chose to testify falsely. [citation omitted]

Memorandum Opinion, page 4, Appendix A. Judges Goodwin, Trott and Ezra did NOT discuss at all Favela's voluntariness issue and citation to *Mincey v. Arizona*, 437 U.S. 385, 401-02 (1978) in their reasoning or holding, aside from noting the citation. Nor, did the judges even seem to have considered the involuntary nature of the statements at issue, as required by yet another well-established precedent – *Arizona v. Fulminante,* 499 U.S. 279, 296 (1991), beyond articulating that Favela was promised "that his statements would not be used against him."

REASON FOR GRANTING THIS PETITION

The Ninth Circuit's approval of the Government's use at trial "for impeachment" purposes of Petitioner's involuntary statements violated due process and boldly ignored the explicit holdings by this Court in *Mincey v. Arizona*, 437 U.S. 385 (1978) and *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991).

Favela explicitly noted in his pleadings before the Ninth Circuit that in *Mincey v. Arizona*, 437 U.S. 385 (1978), this Court **explicitly** held:

> Statements made by a defendant in circumstances violating the strictures of *Miranda v. Arizona* . . . are admissible for impeachment if

> their "trustworthiness . . . satisfies legal standards." [citations omitted] **But *any* criminal trial use against a defendant of his *involuntary* statement is a denial of due process of law "even though there is ample evidence aside from the confession to support the conviction."**

Mincey at 397-98, (emphasis added), quoting *Jackson v. Denno*, 378 U.S. 368, 376 (1964). Despite this explicit quotation by Favela, the Ninth Circuit superficially and surprisingly only noted: "However, Favela's self-incriminating statements became admissible to impeach him when he chose to testify falsely." Memorandum Opinion, page 4, Appendix A. The Ninth Circuit utterly shirked its duty to make a determination regarding the specific issue raised by Favela – that his confession was involuntary and was impermissibly used against him at trial!

The Ninth Circuit here totally ignored this Court's ruling in *Arizona v. Fulminante*, a case prominently cited by Favela, where it specifically noted that *Chapman v. California*[3]:

> [M]ade clear that "before a federal constitutional error can be harmless, the court **must be able to declare** a belief that this was harmless beyond a reasonable doubt."... In so doing, **it must be determined** whether the State has met its burden of demonstrating that **the admission** of the confession . . . did not contribute to [the defendant's] conviction.

---

[3] 386 U.S. 18 (1967).

Fulminante at 295-96, (emphasis added).

In *United States v. Garibay*, 143 F.3d 534, 540 (9th Cir. 1998), the Ninth Circuit held that "The right to remain silent and the right to have counsel present during questioning are indispensable for the protection of the Fifth Amendment privilege against self-incrimination." The Court also noted in *Garibay* that "a defendant's inculpatory statement 'is probably **the most probative and damaging evidence that can be admitted against him**.'" *Garibay* at 539, *quoting* this Court in *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (emphasis added). Moreover, "a defendant's own statements 'have profound impact on the jury, **so much so that we may justifiably doubt its ability to put them out of mind even if told to do so**.'" *Garibay*, at 540; *quoting*, *Fulminante* at 296 (emphasis added).

Here, the Ninth Circuit boldly and prejudicially ignored this Court's precedent and its own decisions to allow impeachment by an un-*Mirandized* and involuntary confession. By that action, the Ninth Circuit essentially created its very own standard in an area of constitutional dimensions. See, *Dickerson v. United States*, 530 U.S. 428 (2000).

CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully Submitted,

EZEKIEL E. CORTEZ
Attorney for Petitioner
1010 Second Avenue, Suite 1850
San Diego, California 92101
Telephone: (619) 237-0309

Dated: July 3, 2002